

1 SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK:

2 -----x  
3 ANTHONY MARCIANO, Individually, and on behalf of  
all other individuals similarly situated,

4 Plaintiff/Petitioners,

5 -against-

Index:  
160914/21

6  
7 BILL DE BLASIO, MAYOR OF THE CITY OF NEW YORK, in  
his Official Capacity; DAVE A. CHOCKSHI,  
8 COMMISSIONER OF HEALTH AND MENTAL HYGIENE, in his  
Official Capacity; DERMOT SHEA, POLICE COMMISSIONER,  
In his Official Capacity; THE NEW YORK CITY BOARD  
9 OF HEALTH; and THE CITY OF NEW YORK,

10 Defendants/Respondents.

11 -----x  
MICROSOFT TEAMS New York County Supreme Court  
80 Centre Street  
12 New York, New York 10013  
December 14, 2021

13  
14 B E F O R E: FRANK P. NERVO, Justice of the Supreme Court

15  
16 A P P E A R A N C E S:

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19  
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BY: EUGENIA FOWLKES, ESQ.  
23 IVAN A. MENDEZ, JR., ESQ.

24

25 Tal R. Hahn,  
Senior Court Reporter

## Proceedings

1 COURT OFFICER: All rise. Supreme Court,  
2 State of New York, Civil Term is now in session.  
3 Honorable Frank Nervo presiding. Be seated and come to  
4 order.

5 THE COURT: All right. Be seated please.  
6 Before we begin, I am going to request that counsel  
7 address the Court from the podium. When you are  
8 addressing the Court from the podium, if you are  
9 comfortable with it, you could remove your mask. When  
10 not addressing the Court and when at counsel table  
11 kindly leave your masks on. You will see the Court is  
12 without a mask so I could be heard through the PA  
13 system. I hermetically sealed myself in this little  
14 box as best as I could. Under the new modified rules  
15 of the court that is permissible, what I just  
16 suggested.

17 So this is the matter of Anthony Marciano,  
18 individually, and on behalf of all other individuals  
19 similarly situated. Plaintiff/petitioner is against  
20 Bill De Blasio, Mayor of the City of New York and  
21 others, under Index Number 160914 of 2021.

22 May we have your appearances for the record,  
23 please, initially on behalf of the plaintiff.

24 MS. FINN: Yes. Good afternoon, your Honor.

25 THE COURT: I can't hear. Sorry.

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1                   MS. FINN: Patricia Finn, F-I-N-N, for  
2                   plaintiff.

3                   THE COURT: Okay. Very good. And on behalf  
4                   of the defendant/respondents?

5                   MS. FOWLKES: Good afternoon.

6                   COURT OFFICER: Press the button.

7                   MS. FOWLKES: Good afternoon. This is  
8                   Eugenia Fowlkes, assistant corporation counsel, counsel  
9                   for the City, respondents.

10                  MR. MENDEZ: And Ivan Mendez, your Honor,  
11                  just observing.

12                  THE COURT: The Court has reviewed the  
13                  submissions by the plaintiff and of course by the  
14                  defendants. And it's -- it appears to the Court, and I  
15                  am sure I will be corrected if I am wrong, that the  
16                  petition is based on essentially three premises; the  
17                  order that was issued -- the orders that were issued  
18                  violate certain of petitioner's constitution on civil  
19                  rights to, among other things, refuse informed consent;  
20                  that it violates the petitioner's right to Due Process  
21                  because the vaccinations have not been approved.

22                  Secondly, that the authority to make the  
23                  determination to impose vaccination mandates is in the  
24                  legislature. And with respect to the action against  
25                  the Police Department and the Commissioner, that said

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1 Commissioner had no right or authority to issue said  
2 rules and then enforce them, both constitutionally and  
3 because they violate a contract.

4 Ms. Finn, did I essentially state your  
5 position?

6 MS. FINN: Yes, your Honor.

7 THE COURT: Okay. I would like you to  
8 address, if you don't mind, at the outset, the  
9 allegation that the Mayor had no authority to issue  
10 these orders to begin with in as much as, among other  
11 reasons, there was no legislative authorization  
12 provided?

13 MS. FINN: There or here?

14 THE COURT: Please. I think it's probably  
15 best if you go from the podium.

16 MS. FINN: Sure.

17 THE COURT: If that works for you.

18 MS. FINN: Yes.

19 (Brief pause.)

20 MS. FINN: Your Honor, I -- our position is  
21 indeed that the respondents do not have the authority  
22 to mandate a mask on any NYPD employee. And you had  
23 mentioned that it was a lack of legislative authority,  
24 but I think we could peel that back and go one further;  
25 it's actually preempted by Congress. That goes to the

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1 issue of informed consent.

2 In the documents that I received last night  
3 from the City in opposition, docket entry 19, paragraph  
4 25, the City indicates that the vaccine has been  
5 approved. That is incorrect. While indeed in August  
6 the FDA issued a rather confusing and convoluted  
7 emergency use authorization, the fact is the only  
8 vaccine -- although it's a Pfizer vaccine, the only  
9 Pfizer vaccine is called Comirnaty. And Comirnaty is  
10 not available in the United States. So it's somewhat  
11 disingenuous to suggest that the Pfizer vaccine, the  
12 EAU Comirnaty is available in the United States. It  
13 definitely is not. And that's likely because there is  
14 no liability protection.

15 Comirnaty is available -- or will be  
16 available this month in Europe. But here in the United  
17 States vaccines are typically liability-free,  
18 particularly vaccines given to children. If you are  
19 injured by vaccines, you go to vaccine court where you  
20 sue the government. You don't sue the pharmaceutical  
21 company. So right off the bat, that is a big problem.  
22 And, you know, I could brief you on it, but the  
23 Comirnaty vaccine, which is the only FDA approved  
24 vaccine, is not available.

25 So, therefore, this brings in to the

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1 emergency use authorizations for the Pfizer and Moderna  
2 vaccine that are available. Under the Food and Drug  
3 FDA and Cosmetic Act -- sorry, I will look that up.  
4 But it's under the Cosmetic Act, an emergency use  
5 authorized drug, whatever it is, and there are  
6 plenty -- anthrax vaccine was an emergency use drug,  
7 but under Federal Law Congress has preempted mandates  
8 of emergency use drugs. That's the bottom line.

9 I think there is a case that's illustrative  
10 on this point. It was the District Court for D.C., and  
11 it was a 2000 case involving vaccines mandated,  
12 emergency use authorized anthrax vaccines mandated on  
13 the military. And the Court clearly indicated that you  
14 cannot mandate an unapproved off label vaccine. I  
15 believe, also, although I can't keep up with all the  
16 orders striking down all the mandates, but I do believe  
17 a Florida court had struck down the Biden mandate on  
18 soldiers. That would be in line with the case that I  
19 talked about.

20 Secondly, under the state law, in December of  
21 2020, a couple weeks after the emergency use vaccines  
22 became available in New York, the legislature under the  
23 novel coronavirus legislation specifically did not  
24 mandate emergency use vaccinations, and the only  
25 authority that the legislature had given to the Health

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1 Department, or in this case the City, was to do contact  
2 tracing. There is absolutely no mandate for masks,  
3 there is no mandate for PCR testing, and there is no  
4 mandate for the vaccine allowed under the novel  
5 coronavirus legislation, and the reason being Congress  
6 preempted it under the Cosmetic Act. Period.

7 Now, if Comirnaty was available, you know,  
8 that might be a horse of a different color, but it's  
9 not. And I am not even sure if it's even being  
10 distributed. So I draw the Court's attention to the  
11 affirmation, paragraph 25, which boldly declares the  
12 Pfizer vaccine is authorized. So now we have the novel  
13 coronavirus legislation. I explained to you it only  
14 allows for contact tracing; nothing else.

15 And then we move to the statute. Public  
16 Health Law 206(1)(1) specifically prohibits an adult  
17 mandate. Now, there is an exception for children. And  
18 that issue has been exhaustively litigated in the 2nd  
19 Department. We have the C.F. case, which respondents  
20 -- the respondents referenced in their opposition. And  
21 several other cases. And so there is a massive  
22 difference between a childhood vaccine that if you are  
23 injured from that you get to go to court and you -- you  
24 get to go to vaccine court and get compensation.

25 Currently right now under the emergency use

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1       you can't do that. But, very specifically, this  
2       statute clearly prohibits an adult vaccination mandate.  
3       And I would suggest, or I would draw the Court's  
4       attention to a recent Fifth Circuit Decision in BST  
5       Holdings versus OSHA that shot down the Biden mandate.  
6       And I think the Court's language in BST is highly  
7       relevant here because the Mayor is doing exactly what  
8       the President had tried to do. They are trying to take  
9       a public health mandate that involves fundamental  
10      decision-making about one's bodily autonomy and they  
11      are trying to bypass legislative determination and  
12      decision-making and convert this public health mandate  
13      into an employment mandate. And that is exactly what  
14      the Fifth Circuit reviewed in BST.

15               In addition to that, the Fifth Circuit talked  
16      about how over-inclusive -- how overbroad and at the  
17      same time under-inclusive this mandate is for the NYPD.  
18      Specifically, it's overbroad because it takes no  
19      account of natural immunity. Now, I want to be clear.  
20      I am not -- this is not a battle of the experts. Half  
21      of that opposition that I got last night is praising  
22      the glories of the vaccines. I am not at all  
23      challenging safety and efficacy of the vaccines. This  
24      is a purely legal argument; preemption, separation of  
25      power, and statutory construction, which brings me to

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1 my next point.

2 In the City's opposition they spend quite a  
3 bit of time talking about the union cases that have  
4 been brought and reasonable accomodation. I could  
5 simply tell you this case is not that. This is not a  
6 PERB issue. It's not a collective bargaining issue.  
7 And the reason is you cannot contract for a mandate  
8 that is fundamentally illegal. You cannot negotiate a  
9 contract term that imposes an illegal mandate. And,  
10 again, starting at the top, Food and Cosmetic Act,  
11 novel coronavirus legislation, Public Health Law 206.

12 So, although I respect what the unions are  
13 trying to do, and they may ultimately prevail, but  
14 without a temporary restraining order which I am asking  
15 you for here on the basis of statutory construction,  
16 not bargaining, okay, I think it's so important to make  
17 that decision. Those cases could take years to be  
18 resolved because of the inability to really obtain a  
19 TRO in a collective bargaining, unlike this case where  
20 there are clear statutory problems, constitutional  
21 problems, preemption, and of course separation of  
22 powers, which brings us to the Mayor.

23 The Mayor has absolutely no authority to --  
24 nor does he have any authority to order it or to direct  
25 subordinates to direct the Police Commissioner or the

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1 Health Department. Now, an important distinction here  
2 might be with the Board of Health. If this Court is  
3 familiar with Garcia versus City of New York, it's a  
4 very interesting case. In the State Supreme Court that  
5 involved a flu mandate that was added to the childhood  
6 schedule. And the Court struck that down as -- as --  
7 it was violating the separation of powers. The 1st  
8 Department upheld that, but on different grounds,  
9 finding it was ultra vires.

10 The Board of Ed did have the authority, but  
11 in this particular instance it had been overturned.  
12 However, the Court of Appeals, you know, reversed and  
13 said that the Board of Health does have the authority.  
14 But, again, I emphasize, that flu shot was for children  
15 and Public Health Law excludes adult mandates. It does  
16 carve-out school-related vaccines. So I think Garcia  
17 is illustrative here, and Garcia absolutely explained  
18 Public Health Law and the difference between the adult  
19 mandate.

20 THE COURT: Since you have segued into the  
21 authority, or lack of authority of the Board of Health,  
22 what is it --

23 MS. FINN: Yes?

24 THE COURT: -- what is it -- this might be a  
25 question perhaps directed to the Corporation Counsel

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1       when they are at the podium, but under what authority  
2       did the Department of Health, and of course you would  
3       say they had no authority, to issue the mandate that  
4       they issued?

5               MS. FINN: They don't.

6               THE COURT: What authority -- so let me  
7       rephrase the question for you.

8               What authority would they have needed to  
9       issue the mandate that they issued?

10              MS. FINN: Okay, but it applied to children  
11      on --

12              THE COURT: Adults only.

13              MS. FINN: There is none. It's precluded.

14              THE COURT: Well, can it be argued that the  
15      Commissioner has the authority under circumstances, and  
16      of course they would argue this is one of those  
17      circumstances, that the Commissioner could, in fact,  
18      issue an emergency mandate such as we have here, but  
19      then it would have to be brought before the Board  
20      within five days for it to continue?

21              MS. FINN: No, it could not.

22              THE COURT: Could not. So you say -- your  
23      position is that the -- that the Commissioner of the  
24      Health and Mental Hygiene Service the Department of  
25      Health has no authority under any circumstances to

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1 direct adults to be vaccinated?

2 MS. FINN: No, and the point I was making is  
3 in Garcia you had a different situation. The Court of  
4 Appeals found that the Board of Health does have the  
5 authority to regulate childhood vaccines, but there is  
6 no corresponding authority.

7 Moreover, even if the Board of Health was to  
8 do it, there is procedural rules. There has to be a  
9 notice. There has to be a hearing and there has to be  
10 a vote.

11 THE COURT: That's right. And the hearing  
12 and vote would be by whom?

13 MS. FINN: The Board of Health.

14 THE COURT: Okay.

15 MS. FINN: So --

16 THE COURT: Was that done in this case?

17 MS. FINN: Pardon me?

18 THE COURT: Was that done in this case?

19 MS. FINN: No.

20 THE COURT: Okay. My question may be  
21 rhetorical, but I just want to confirm my understanding  
22 of the facts.

23 MS. FINN: No, it's a procedural issue. But  
24 let me explain to your Honor why the Mayor is doing  
25 this and not the Board of Health. Because the law is

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1           very --

2                       THE COURT:   Wait a minute.   The Board of  
3   Health issued -- didn't the Board of Health also issue  
4   a mandate?

5                       MS. FINN:   No.

6                       THE COURT:   It was just the --

7                       MS. FINN:   Okay.   Why is the Mayor tackling  
8   this beast instead of the Board of Health?

9                       THE COURT:   So why is the Board of Health --  
10   why is the Commissioner of Health and Mental Hygiene in  
11   this case?

12                      MS. FINN:   Pardon?

13                      THE COURT:   Why did you sue the Commissioner  
14   of Health and Mental Hygiene?

15                      MS. FINN:   Because they reissued a series of  
16   orders that lack any legislative underpinning.   And  
17   they're a necessary party.   We had to sue them.   I  
18   would have preferred to leave them out, but they are  
19   in.

20                      But the bottom line is, the Board of Health  
21   is -- let's say even if the Board of Health wanted to  
22   try and do this, it is possible that if the Board of  
23   Health determined that a particular officer was a  
24   threat, and they wanted to either impose a physical  
25   restraint such as a mask mandate or they demanded they

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1 get tested every week, or the dreaded emergency use  
2 vaccine, they would have to petition a magistrate under  
3 Public Health Law 2120, and they would have to  
4 demonstrate two important things; they would have to  
5 demonstrate that the person being restrained or subject  
6 to a judicial order of quarantine, that person would  
7 actually have to be infected or suspected of infection.

8 My client has natural immunity. He tested  
9 positive. He has already had COVID. So you can't make  
10 that. Then we get to the second part; the least  
11 restrictive means. Your Honor, I respectfully say -- I  
12 do not diminish the totality of this COVID nightmare.  
13 It has affected everybody. I mean, me personally.  
14 Everybody in this room is struggling. But when you  
15 look at this opposition document, everything is  
16 hysterical. It's all exaggerated. It's one hundred  
17 percent increase. Well, what does that mean? We went  
18 from two people to four people? The fact is, the  
19 government, the City is trying to, you know, drag us  
20 into this battle of the experts where, you know, the  
21 Courts are differential to a public health authority --

22 THE COURT: Well, we don't get there, do we,  
23 Ms. Finn, until we first establish that the Mayor had  
24 authority to issue this order to begin with.

25 MS. FINN: I think, your Honor, even if the

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1 Mayor -- the Mayor cited an Executive Law authority,  
2 but if you look at the Executive Law, Section 22-A,  
3 it's a -- it defines disaster, and that definition  
4 includes an epidemic. But although the City pointed  
5 out the C.F. case, which was a completely different  
6 case; you had a nuisance, it was declared by the Board  
7 of Health that was procedurally appropriate, nothing  
8 like what is going on here, the 2nd Department held in  
9 C.F. that it was temporary, it had been over by the  
10 time it got to the court, and the issue was whether or  
11 not it was arbitrary and capricious. It's not.

12 What I am trying to point out here is that  
13 the Executive Law, in order to enact an emergency  
14 regulation, you have to have an emergency. The CDC --  
15 this is not -- this is not Patricia Finn or a couple  
16 people that are protesting against vaccines. The CDC  
17 is our authority. I didn't bring in a scientist from  
18 Germany or someone else. I am asking you, your Honor,  
19 to take a look at what CDC is saying. Aside from the  
20 fact that they are all over the place scaring everyone  
21 to death, unaware of the potential of the variants -- I  
22 mean, everyone knows diseases have variants. How are  
23 they so shocked that an omicron variant, or that the  
24 delta variant -- is it reality? Is it really the  
25 number of cases? Sometimes, your Honor, you want

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1 cases. Currently children seem to have a prevalence of  
2 COVID antibodies, and yet they experience zero -- few  
3 to none symptoms. Any children that have been injured  
4 tended to have comorbidities; overweight, other  
5 illnesses. I will set aside for a moment the total  
6 inability to even track COVID data -- COVID deaths.  
7 But the fact is that children, if they get COVID, they  
8 decrease the prevalence of the illness in the  
9 population. That's a good thing. Cases are a good  
10 thing.

11 What we want to look at is infection fatality  
12 rate. And according to the CDC we have a 98.7 percent  
13 survival rate. And I would respectfully ask your Honor  
14 to give me a ruling as to whether or not a 98.7 percent  
15 survival rate rises to the level of an epidemic or  
16 disaster as defined in the Executive Law.

17 I believe Judge Colon also in the I.R.O.A.R.  
18 case specifically went through what the Mayor has to do  
19 in order to declare an emergency. And she found that,  
20 you know, this ain't it. This is not it. So, your  
21 Honor, it's not case -- it's not the number of cases;  
22 it's infection fatality rate.

23 THE COURT: Why are you limiting the criteria  
24 to fatalities?

25 MS. FINN: Pardon me?

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1                   THE COURT: Why are you limiting the criteria  
2                   to just fatalities? Why can't serious illnesses or  
3                   hospitalizations constitute an emergency?

4                   MS. FINN: That is an excellent point, but  
5                   prior to COVID-19 we already had a hospital shortage.  
6                   The problem, what's going on in the -- there was  
7                   insufficient healthcare workers, insufficient --

8                   THE COURT: I am just questioning the  
9                   criteria that you are developing for what establishes  
10                  an emergency.

11                  MS. FINN: That is what I am asking you. In  
12                  W.T. versus County of Rockland upheld by the 2nd  
13                  Department a week --

14                  THE COURT: How could I make that  
15                  determination without expert testimony as to what an  
16                  emergency is?

17                  MS. FINN: Well, your Honor, you could rely  
18                  on the statistics and the definition in the Executive  
19                  Law. Judge Thorsen held that the minuscule number of  
20                  measles cases did not, in his opinion, and that was  
21                  based on government data -- it was actually based on  
22                  data offered by the county -- that the number of cases  
23                  did not rise to level of an epidemic. And that was  
24                  appealed to the 2nd Department and it was upheld. So  
25                  it wasn't disturbed. And then a week later Judge

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1 Knipel ruled in C.F. that that measles mandate was  
2 lawful. The point being, in Rockland County and in  
3 Brooklyn you have these concentrations of has Hasidic  
4 communities. And what was happening in these  
5 communities, they weren't intentionally spreading  
6 measles to a point having to be vaccinated. It wasn't  
7 an outbreak; it was an in-break.

8 And so the Health Department went through  
9 appropriate procedures, Board of Health rules, they  
10 declared a nuisance and, you know, I personally -- I  
11 mean, I tried that case in Rockland, so I think I did a  
12 good job. But I think my counterparts in Brooklyn  
13 might have missed the mark slightly.

14 So, your Honor, in summary, unless you have a  
15 question, you know, in addition to all this I would ask  
16 you to think about what the Court -- the 2nd Department  
17 did in C.F.. The 2nd Department specifically upheld  
18 Jacobson versus Massachusetts. I know a lot of lawyers  
19 have argued it's bad law, it's old law, it should be  
20 updated, and that may be true, but this lawyer doesn't  
21 believe that. I think Jacobson is an excellent  
22 holding. And recently the Supreme Court, Justice  
23 Gorsuch in Candan v. Newsome and Doe v. Mills -- I am  
24 sorry, your Honor, it was Roman Catholic Archdiocese  
25 versus Cuomo and Justice Gorsuch said that if Jacobson

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1 was to come in front of them today it would be upheld.  
2 Why would it be upheld? Because Jacobson, all he faced  
3 was a five dollar fine. He wasn't facing losing his  
4 job, a suffocating mask mandate, an invasive PCR test  
5 that could cause injury to the nasal cavity and the  
6 brain. All he had to do was pay five bucks. And I  
7 doubt that there's very few people that would pay five  
8 dollars to get out of one of these mandates.

9 Jacobson foresaw the possibility of a vaccine  
10 mandate being a plain and palpable invasion of  
11 fundamental rights, and it's here. This is it. COVID  
12 is absolutely overblown. It's the infection fatality  
13 rate that matters, not the case rate. And that is true  
14 of many, many viruss. We are an ecosystem. People  
15 need exchange in order to develop immunity.

16 But, again, I really do not want to get  
17 sucked into the science. Jacobson said a vaccine  
18 mandate had to be necessary, harm avoiding,  
19 proportional and nondiscriminatory. This mandate  
20 imposed by NYPD is none of those things. Jacobson said  
21 in order to -- the legislature, not the Executive, not  
22 the regulatory agencies, for the legislature to impose  
23 a mandate there must be grave danger. The Court -- I  
24 believe the language was "imperils society." There  
25 must be an epidemic, there must be an emergency, which

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1 is how this ties into the statute, the Executive Law  
2 20.A. 20.A defines a disaster as an epidemic. And the  
3 2nd Department upheld Judge Thorsen's determination  
4 that the rate of measles infection, which is higher  
5 than COVID now, did not rise to the level of an  
6 epidemic.

7 So I am not asking you to rule on the science  
8 per say; I am asking you to rule on the legal  
9 definition, and particularly to rely on the 1905  
10 landmark vaccine refusal case, Jacobson versus  
11 Massachusetts. The Court held there was a duty for --  
12 the Supreme Court held there was a duty for this Court  
13 to adjudicate when a vaccine mandate is cruel -- not  
14 sure if I remember the language specifically, but it  
15 was -- it would be cruel to vaccinate people. And, you  
16 know, that is what is going on right now.

17 May I just sum up thirty seconds?

18 THE COURT: Absolutely.

19 MS. FINN: So, your Honor, I will start at  
20 the top. It's always a good place to start.

21 Congress has under the Food and Drug and  
22 Cosmetic Act prohibits emergency use authorized drugs  
23 from being mandated. It's preempted that the Comirnaty  
24 vaccine is not available in the United States. And, by  
25 the way, we have two weeks before Mayor De Blasio is

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1 replaced by Mayor Adams -- soon-to-be Mayor Adams. And  
2 he's expressed relaxing these mandates. So I think a  
3 temporary restraining order is appropriate because  
4 think of the damage it's going to cause.

5 Secondly, that statement about Comirnaty to  
6 the best of my knowledge is completely false. It's not  
7 available. It's only EAU. Second, in December of  
8 2020, when the EAU vaccines were already available the  
9 legislature did not mandate a vaccine. And they  
10 couldn't because they were preempted under the Food and  
11 Drug and Cosmetic Act. It's simple as heck. And then  
12 you got the statute 206(1)(1) which prohibits adult  
13 vaccines. You have the authority of Garcia versus City  
14 of New York for a resource on interpreting that  
15 statute.

16 Finally, even if the Board of Health or the  
17 Governor, or the Mayor, or the Police Commissioner  
18 determined that an individual officer is a particular  
19 threat, Public Health Law 2120 requires an additional  
20 order of quarentine. I am sure this Court is well  
21 aware of cases of people that may be mentally ill, or  
22 someone who is sick that refuses to follow guidance.

23 It is the burden of the local Health  
24 Department to petition the Court to establish that the  
25 person is infected or suspected of infection, and it is

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1       the least restrictive means. They have not done that,  
2       and they cannot do it, which is why the Board of Health  
3       can't mandate a blanket mandate like they have. And  
4       that was reaffirmed in BST versus OSHA in the Fifth  
5       Circuit. And the Court was crystal clear; you cannot  
6       convert a public health mandate into an employment  
7       mandate particularly when the mandate is overbroad,  
8       does not include a potential for natural immunity which  
9       Federal Courts have recognized in the prisoner release  
10      cases that -- inmates that had already been infected  
11      and were let out, or were petitioning to be let out,  
12      they had no risk of reinfection because they had  
13      already gotten COVID and recovered.

14               So I think it's clearly defined that this  
15      mandate, even if it was legal, is overbroad. It's also  
16      at the same time under-inclusive. What about the  
17      people being arrested? What about the mailman that's  
18      coming into the police department? Or the Fed-Ex guy  
19      or delivery guy, or whoever is there? The Court has  
20      struck down mandates for larger companies over one  
21      hundred as being both overbroad and under-inclusive.  
22      And we have the same thing here. These police officers  
23      are involved with people all over.

24               And, you know, I take issue with this  
25      conclusion that eighty percent of the population is

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1 vaccinated. I highly doubt that. And I will just  
2 leave it at that. But if they are, I would submit to  
3 your Honor that the majority of them acquiesced because  
4 they were afraid of losing their jobs. So I ask you,  
5 your Honor, this does not rise to the level of a  
6 disaster that imperils society. It's bad, I get it,  
7 but it's not there. Thank you.

8 (Brief pause.)

9 THE COURT: Ms. Fowlkes, you care to respond?

10 MS. FOWLKES: Yes, your Honor. Just one  
11 moment.

12 (Brief pause.)

13 MS. FOWLKES: Your Honor, we have addressed  
14 these arguments as presented in the petition in our  
15 opposition papers that we submitted last night. So to  
16 the extent that you have any specific questions, I'd be  
17 happy to answer them after I give my formal  
18 presentation.

19 Now, specifically here for the purposes of  
20 today, this issue regarding the vaccine mandate and  
21 specifically regarding granting a preliminary  
22 injunction on the vaccine mandate, this has been  
23 litigated over and over again. It has been litigated  
24 repeatedly and each time the courts here in New York  
25 and the Second Circuit have refused to grant a

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1 preliminary injunction. And this Court's decision  
2 today should be no different.

3 Now, specifically here for the purposes of  
4 this preliminary injunction, opposing counsel has not  
5 addressed the existence of irreparable harm. Now,  
6 first, this case was brought over a month after the  
7 Commissioner's order, over a month after the  
8 Commissioner's order was distributed to municipal  
9 employees and over a month after Mr. Marciano  
10 presumably had notice on the order. So this delay  
11 contradicts any irreparable harm --

12 THE COURT: Sorry. Sorry for interrupting.  
13 Has Mr. Marciano been put on leave without  
14 pay status?

15 MS. FOWLKES: Your Honor, all that we are  
16 aware of right now is that Mr. Marciano has applied for  
17 a reasonable accomodation, and is awaiting a decision  
18 on that. So since he applied for it he is not yet on  
19 leave without pay status.

20 THE COURT: He is not yet on --

21 MS. FOWLKES: That's correct. He is not yet  
22 on leave without pay status because he has submitted a  
23 reasonable accomodation request.

24 THE COURT: Okay.

25 MS. FOWLKES: Now, as for the irreparable

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1       harm, the only points that are brought up in the  
2       petition is that Mr. Marciano would be forced to  
3       succumb to a vaccine. Now, the vaccine mandate is not  
4       compelling anyone to receive a vaccine. It's not  
5       holding someone down and forcing them to receive a  
6       vaccine. Rather, it is -- that the vaccine mandate is  
7       asking municipal employees to comply with a term of  
8       employment.

9               THE COURT: Was this term of employment in  
10       effect at the time these people were initially  
11       employed?

12              MS. FOWLKES: No, it was not, your Honor.

13              THE COURT: So it was a term of employment  
14       that has been recently added under the current emergent  
15       conditions?

16              MS. FOWLKES: That's correct, your Honor.  
17       This is a term of employment that was, as you just  
18       stated, your Honor, added as of recent developments in  
19       the last few months. Now, the vaccine mandate is  
20       asking municipal employees to meet this term of  
21       employment, and they have the choice to meet this term  
22       of employment or to not meet this term of employment.

23              THE COURT: And face possible -- being placed  
24       on leave without pay?

25              MS. FOWLKES: That's correct, your Honor.

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1 THE COURT: Isn't that -- to use to a  
2 colloquial term, strong-arming tactic?

3 MS. FOWLKES: No, your Honor, it is not. And  
4 petitioner, plaintiff/petitioner would be subject to --

5 THE COURT: Oh, it's a motivation. It's a  
6 motivation for these employees to comply with this  
7 mandate -- or this order which we will discuss in a few  
8 moments with respect to its validity in the first  
9 place -- to comply with the order that the Mayor issued  
10 or you will be on leave without pay. So it's an  
11 incentive, correct?

12 MS. FOWLKES: That's correct, your Honor.

13 THE COURT: Like the other incentives we've  
14 heard about where the City offers one hundred dollars  
15 to get a vaccination, things of that nature.

16 MS. FOWLKES: Similar.

17 THE COURT: Similar, but different effect to  
18 the party.

19 MS. FOWLKES: Effectively, this would be  
20 different in the sense that the Mayor is asking  
21 pursuant to his authority as the Executive Branch. And  
22 as --

23 THE COURT: He is asking? So the ask is,  
24 kindly follow my directive or you will soon be without  
25 income?

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1 MS. FOWLKES: Your Honor, essentially yes, it  
2 is to -- for municipal employees specifically to comply  
3 with this term of employment, and it's a lawful  
4 directive by the Mayor as has been --

5 THE COURT: Under what authority can the  
6 Mayor establish a term of employment after people have  
7 been employed by the City of New York, or, in this case  
8 the New York Police Department for some period of time?  
9 How does that work?

10 MS. FOWLKES: Yes, your Honor. Allow me to  
11 outline the process for this authority here. The Mayor  
12 has the authority, and this was specifically outlined  
13 in the I.R.O.A.R. case that opposing counsel cited to.  
14 Judge Coleman described that the Executive Branch made  
15 issue with reference to those entities within its  
16 authority.

17 Now, Judge Coleman specified who is within  
18 the authority. Those are subject to the Mayor's orders  
19 and these are generally employees of the Executive  
20 Branch which include municipal employees. Now,  
21 additionally, this order was provided -- or was created  
22 by the Department of Health and Mental Hygiene. And  
23 that is pursuant to their own authority, specifically  
24 that is brought in the City Charter.

25 Now, the City Charter, specifically Section

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1        556 -- 556 Subsection C, empowers the DOHMH with  
2        jurisdiction to regulate all matters effecting the  
3        health in the City of New York, including communicable  
4        diseases. And, furthermore, the New York City  
5        Administrative Code, Section 17-109 Subsection B  
6        delegates this authority to the DOHMH to take measures  
7        of general and gratuitous vaccines, or vaccination. So  
8        the DOHMH has authority to adopt these vaccine  
9        measures, and as for the --

10                THE COURT: Pardon my unfamiliarity with some  
11        of statutes you are referencing, and how they all work  
12        together. Let me ask you this. Can the DOH do this in  
13        total abrogation of Section 3.01(c) of the Health Code  
14        which states, in substance, "the Health Code does not  
15        require the immunization of adults?"

16                MS. FOWLKES: Your Honor, I am not sure I got  
17        the first part of the -- before you asked the question.

18                THE COURT: Well, can the Department of  
19        Health ignore Section 3.01(c) of the Health Code which  
20        states "the Health Code does not require the  
21        immunization of adults?" How does that factor into  
22        what you just said?

23                MS. FOWLKES: Yes, your Honor. The  
24        authorities that we cited separate from what you just  
25        cited to the Section 3.01 of the Health Code, they are

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1 not exclusive of each other. Because the authority  
2 that we are citing to here is legislatively -- this was  
3 brought by legislative means. And this delegated the  
4 authority to specific actors. And here it was  
5 delegated specifically to DOHMH, and specifically to  
6 the Commissioner.

7 THE COURT: And what statute was that that  
8 was delegated by the legislature?

9 MS. FOWLKES: So, first, this is the New York  
10 City Charter.

11 THE COURT: Yes?

12 MS. FOWLKES: And then we have the New York  
13 City Administrative Code. New York City Charter 556,  
14 Subsection C. New York City Administrative Code  
15 Section 17-109, Subsection B, as in boy.

16 (Brief pause.)

17 THE COURT: Doesn't 17-109 refer specifically  
18 to vaccinations that may be provided gratuitously, and  
19 does not provide for mandatory vaccination?

20 MS. FOWLKES: That is correct, your Honor, it  
21 doesn't say anything about mandatory vaccinations but  
22 it does provide for gratuitous vaccinations. But this  
23 is important because, as we have made clear in the  
24 papers, this was promulgated in -- under the lawful  
25 authority of what we just cited here. And the DOHMH is

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1       essentially providing a choice to municipal employees,  
2       because it is able to provide this term of condition to  
3       municipal employees specifically. This is not for the  
4       rest of the city. This is not for private citizens.  
5       This is for employees that work for the city. And it's  
6       giving them a choice that they could either comply with  
7       this or they could choose to find a job somewhere else  
8       that has no vaccine mandate.

9               THE COURT: And that's a reasonable choice in  
10       your estimation?

11              MS. FOWLKES: Your Honor, this is reasonable  
12       because this is a term of employment. And although  
13       this was something that they may not have signed on to  
14       when they initially joined, this is a term of  
15       employment that's been promulgated in light of  
16       circumstances recently.

17              THE COURT: In terms of employment, can  
18       themselves be changed during the course of somebody's  
19       employment?

20              MS. FOWLKES: Your Honor, yes.

21              THE COURT: Not to be flip, were the  
22       Commissioner of the Police Department or the Mayor  
23       decide, well, we have a new term of employment;  
24       everybody must be six foot tall to be a policeman. If  
25       you don't fit that term of employment, nice knowing

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1           you.

2                   MS. FOWLKES: Your Honor --

3                   THE COURT: How is that different?

4                   MS. FOWLKES: -- unfortunately, your Honor, a  
5           hypothetical such as that or any sort of analogy is not  
6           spot-on to the case at hand. But in an attempt to  
7           answer the logic there, that would be subject to some  
8           sort of judicial review as is the case here.

9                   THE COURT: Exactly right. That is why we  
10          are here; Judicial review of this term of employment,  
11          which you are arguing is permissible by the  
12          Commissioner -- by the Police Commissioner and is  
13          reasonable --

14                  MS. FOWLKES: Yes, your Honor.

15                  THE COURT: -- under the circumstances.

16                  MS. FOWLKES: Yes. And, your Honor, I would  
17          like to specifically point to the New York City Charter  
18          Section 434 --

19                  THE COURT: Okay.

20                  MS. FOWLKES: -- which delegates authority to  
21          the New York Police Department's Commissioner to have  
22          control of the government, administration, disposition  
23          and discipline of the department and the police force  
24          of the department.

25                  And so specifically as to the argument that

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1 the Commissioner was unable to promulgate or enforce  
2 the order at issue here, the Section 434 states that  
3 this is within the Commissioner's authority.

4 THE COURT: Okay.

5 MS. FOWLKES: And, your Honor, specifically  
6 here, as stated before, petitioner is not being  
7 compelled to succumb to a vaccine. The petitioner is  
8 being given a choice.

9 Now, essentially what the petitioner is  
10 alleging is irreparable harm, for purposes of the  
11 preliminary injunction, is that there is a loss of  
12 employment. And the loss of employment has been the  
13 type of harm that is plainly repairable. It can be  
14 redressed through monetary damages. And as compared to  
15 what is the situation currently, that we are fighting  
16 this public health issue, petitioner should not be able  
17 to -- should not be allowed to pause a vaccine mandate  
18 that is designed to cover the public health's  
19 interests, to cover the public health issues here just  
20 for their personal interests.

21 They -- if they are successful, they could be  
22 redressed after the merits have been heard, after the  
23 conclusion of this. Loss of employment is not an  
24 irreparable harm and, thus, should not be the reason  
25 why the preliminary injunction is granted as to the

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1 vaccine mandate.

2 THE COURT: I understand that, without  
3 question. But as a matter of discretion, let's say,  
4 what harm would there be to the defendants in this case  
5 were the Court to issue a TRO? And I am aware that's  
6 not the standard, but I am just asking, what harm would  
7 there be to the defendants in this case were the Court  
8 to issue the TRO so that, in effect, the plaintiffs  
9 such as Mr. Marciano and others similarly situated  
10 could continue to litigate these matters without the  
11 possibility of being without income, and all the  
12 problems that would raise, including possible  
13 foreclosure on their homes, their children -- of course  
14 maybe I am exaggerating to make the point -- and their  
15 wife and children to be homeless? What would the harm  
16 be to the City under those circumstances?

17 MS. FOWLKES: Your Honor, the harm would be  
18 that there would be nothing in place to at least  
19 attempt to mitigate coronavirus COVID-19 infections.  
20 If the City is unable to --

21 THE COURT: So you are making my point that  
22 what this effectively is, is strong-arming the  
23 plaintiff and others to get the vaccine or face the  
24 possibility of homelessness.

25 MS. FOWLKES: Your Honor, we disagree, but

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1           essentially if that is -- you know, if that is the  
2           position you wish to take, absolutely.

3                   THE COURT:   It's a reasonable perspective.

4                   MS. FOWLKES:   Yes.

5                   THE COURT:   Okay.

6                   MS. FOWLKES:   But specifically here it is a  
7           reasonable -- it's also reasonable for the Executive  
8           Branch to create a term of employment, and the terms of  
9           employment have been created time and again here,  
10          specifically for municipal employees.   So this is  
11          limited to municipal employees and it is not as for any  
12          other private citizens or private entities.

13                   THE COURT:   How does the reality that police  
14          officers such as Mr. Marciano, detectives such as  
15          Mr. Marciano are employed pursuant to a contract factor  
16          into your argument?

17                   MS. FOWLKES:   Your Honor, you are referring  
18          to the collective bargaining agreement?

19                   THE COURT:   Exactly.

20                   MS. FOWLKES:   Yes.   So the Commissioner, the  
21          NYPD Commissioner's order is, in effect, supplementing  
22          the CBA, so the Commissioner, by the authority that was  
23          promulgated to him, was the New York City Charter, is  
24          able to supplement the terms of conditions here.   And  
25          so with respect to the CBA, this -- as for the specific

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1 terms that might be effected here, the Commissioner's  
2 order would replace that.

3 THE COURT: Are there any restrictions on the  
4 terms of employment that can be added or modified by  
5 the Police Commissioner, or is it anything he believes  
6 in the best interests of the City and police department  
7 is appropriate?

8 MS. FOWLKES: Your Honor, the New York City  
9 Charter has not specified, or lists any terms of  
10 conditions that may be modified or that cannot be  
11 modified. But the Commissioner by his or her very  
12 position would have the authority to decide those  
13 issues if and when they arise.

14 THE COURT: So there is no beginning point  
15 and no ending point as to the Commissioner's authority  
16 in that regard?

17 MS. FOWLKES: No, your Honor. There is  
18 absolutely a beginning point in terms of the -- they  
19 could not surpass what has been lawfully promulgated to  
20 them. But it's specific to the administration of the  
21 police force, specific to the governance of the police  
22 force. And separate from whatever is at issue here --

23 THE COURT: And you say that is not subject  
24 to review?

25 MS. FOWLKES: Your Honor, you mean --

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1 THE COURT: The terms of employment change.

2 MS. FOWLKES: Presumably this could be  
3 subject to Judicial review if they are being asked to.  
4 But we submit, your Honor, that this is -- this has  
5 been upheld by numerous courts. And specifically as  
6 for the New York Police Department's authority and the  
7 order that he promulgated, this is not any different  
8 from on the other orders as specific to the Fire  
9 Department of New York, or to the Department of  
10 Education. And so those two have been affirmed  
11 unanimously.

12 THE COURT: By the 1st Department?

13 MS. FOWLKES: Sorry?

14 THE COURT: By the Appellate Division, 1st  
15 Department?

16 MS. FOWLKES: By the 2nd Department.

17 THE COURT: Appellate Division, 1st  
18 Department?

19 MS. FOWLKES: I would have to --

20 THE COURT: I don't think you will find any.

21 MS. FOWLKES: Sorry?

22 THE COURT: I don't think you will find any.

23 MS. FOWLKES: So, your Honor, it's that the  
24 Police --

25 THE COURT: I understand the rules that I am

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1 bound by any Appellate Division whose already taken a  
2 position on it, and I will take that into  
3 consideration.

4 MS. FOWLKES: Thank you, your Honor.

5 THE COURT: Yes.

6 MS. FOWLKES: Is there -- does your Honor  
7 have --

8 THE COURT: May I look at my notes? I think  
9 you'll concede it's an awful lot of material to absorb  
10 in a week, particularly in view of all our busy  
11 schedules.

12 All right. The orders were issued by the  
13 Department of Health.

14 MS. FOWLKES: That's correct.

15 THE COURT: Was it issued by the Board of the  
16 Department of Health or just the Commissioner?

17 MS. FOWLKES: The Commissioner, your Honor.

18 THE COURT: Correct me if I am wrong, I may  
19 have read the cases differently, but isn't there a  
20 requirement for the Commissioner then to present the  
21 matter to the Board for a full vote of that board?

22 MS. FOWLKES: There is that requirement in  
23 the statute but that requirement is not applicable  
24 here. What the Commissioner ordered here is something  
25 that has already been promulgated to him, and that is

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1       the -- that's a measure regarding a communicable  
2       disease.

3               THE COURT: That was promulgated to him by?

4               MS. FOWLKES: By the New York City Charter,  
5       or more specifically, by the Administrative Code  
6       Section 17-109.

7               THE COURT: Just as a thought, there seems to  
8       be an awful lot of run-arounds for the Executive to  
9       take to avoid certain statutory or legislative  
10      requirements. That obviously I will take a closer look  
11      at.

12              MS. FOWLKES: If I may respond?

13              THE COURT: Sure.

14              MS. FOWLKES: The City is of the position  
15      that this is not anything -- this is not skirting  
16      around any sort of legislative policy making. This is  
17      rule making, which is -- it's what the legislature gave  
18      to the agencies. The legislature chose the end of  
19      public healthcare and the means to promote that end by  
20      empowering the agencies to add these necessary  
21      directives or measures. And here it's specific to  
22      mitigate this threat of communicable diseases.

23              So this is not -- this is not law making or  
24      legislation creation, policy making, this is just  
25      embracing the directives and the measures have been

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1           lawfully promulgated by statute.

2                   THE COURT:   Which would be -- which an  
3           examiner of the various statutes may come to the  
4           conclusion are inconsistent with other statutes  
5           developed by the legislature.  For example, Public  
6           Health Law 206 which clearly says -- it was mentioned  
7           in Garcia, Public Health Law 206, "does not authorize  
8           the mandatory vaccination of adults."

9                   MS. FOWLKES:  Your Honor, we would submit  
10          that specifically without trying to go into the  
11          specifics of Garcia, I would have to brief you at a  
12          later date, this specifically is not in contradiction  
13          with any other statutes because this is specific to the  
14          Executive Branch and specific to municipal employees as  
15          is provided by the statutes that we've discussed.

16                   THE COURT:  We are not dealing with the  
17          general public, we are dealing with municipal employees  
18          and, therefore, there is other criteria to be met.

19                   MS. FOWLKES:  That's correct.

20                   THE COURT:  All right.  I understand there  
21          are a number of other matters pending addressing  
22          similar or the same issues in this one in other courts,  
23          correct?  One in particular, Justice Hagler of this  
24          court, which has been put over to February.

25                   MS. FOWLKES:  I would have to confirm.

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1           THE COURT: I only mention it because it  
2           appears to me that it's going to take some time for  
3           these cases to work their way through the trial and  
4           perhaps Appellate process.

5           MS. FOWLKES: Yes, your Honor.

6           THE COURT: At the -- frankly, at the risk of  
7           stating the obvious, I presume there are others  
8           elsewhere.

9           Did you want to speak to your co-counsel?

10          MR. MENDEZ: I just want to --

11          THE COURT: Use the mic.

12          MR. MENDEZ: I just want to share with the  
13          Court, yes, the matter before Justice Hagler that was  
14          brought by the Correction Officers Benevolent  
15          Association has been put off to February. There is  
16          another matter tomorrow before Judge Frank on  
17          preliminary injunction. That is in a case brought by  
18          the Police Benevolent Association, the union  
19          representing the police officers. And in that case the  
20          union is challenging -- they claim not to be  
21          challenging the mandate, though they actually are, but  
22          they are focused on the reasonable accomodation process  
23          that was offered to police officers.

24          THE COURT: Which raises the question in this  
25          case, which either counsel could address; why is the

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1 reasonable accomodation standard not applicable to  
2 Officer Marciano? Or is it your position that there is  
3 no possible way to reasonably accommodate someone that  
4 hasn't been vaccinated?

5 MR. MENDEZ: No, your Honor, he has requested  
6 an accomodation. That is pending with the NYPD. No  
7 decision has been met. While that is pending he's not  
8 on leave without pay. He tests. He can continue to  
9 work until such time as that request is provided.

10 THE COURT: Until such time as the hammer  
11 comes down and the Commissioner says you are now  
12 without pay, unless they come up with a reasonable  
13 accomodation.

14 MR. MENDEZ: That's correct, your Honor.

15 THE COURT: All right. I just want to make  
16 sure I was seeing the obvious.

17 MR. MENDEZ: Just briefly, your Honor, if I  
18 may?

19 THE COURT: Certainly.

20 MR. MENDEZ: There's been a lot of talk about  
21 Detective Marciano and, quote, unquote, other similarly  
22 situated. I just want to put before the Court there is  
23 no record before the Court as to the individual  
24 circumstances of any other officers. There are no  
25 affidavits, there is no testimony. We don't even have

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1 testimony from Detective Marciano.

2 So the assumption that as a result of the  
3 imposition of the mandate the detective would  
4 potentially lose his home and go homeless, that is not  
5 a reasonable assumption based on this record, your  
6 Honor. It's not in the record. They -- petitioner  
7 made the record.

8 THE COURT: I understand your position.  
9 Sure. For all we know Mr. Marciano could be  
10 independently wealthy and in the end the proposition is  
11 totally moot. But we don't know that.

12 MR. MENDEZ: That is as possible as some of  
13 the other speculation that we could sit here and engage  
14 in all day with the circumstances of thousands of other  
15 police officers. Without a proper record, counsel  
16 doesn't have organizational standing like a union  
17 potentially would to bring a claim on behalf of  
18 similarly situated individuals. There is one  
19 petitioner.

20 THE COURT: All right. So, therefore, it's  
21 your position that, at best, the caption is  
22 inappropriate.

23 MR. MENDEZ: That and --

24 THE COURT: And --

25 MR. MENDEZ: And any order issued by the

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1 Court should necessarily be limited to Detective  
2 Marciano because there is nobody else before --

3 THE COURT: Well, that may be an argument you  
4 may have to make in another court before another Judge  
5 or not. I have not determined that yet.

6 MR. MENDEZ: We will just point out, we  
7 addressed the standing issue in the papers.

8 THE COURT: Sure.

9 MR. MENDEZ: There is only one petitioner  
10 here.

11 THE COURT: Right. Very good. Anything  
12 further you wish to advise the Court, Ms. Fowlkes?

13 MS. FOWLKES: Nothing else, your Honor.

14 THE COURT: Okay. Ms. Finn, would you like  
15 to respond?

16 MS. FINN: Yes.

17 THE COURT: I thought so. Okay.

18 (Brief pause.)

19 MS. FINN: Thank you. Your Honor, there is  
20 indeed testimony on this record. Detective Marciano  
21 has given an affidavit. And, quite frankly, and  
22 respectfully, it doesn't matter if he's a millionaire  
23 or if he is the poorest person in the world. The fact  
24 is that he has a 14th Amendment Due Process right to  
25 the statutory protections that prohibit adult vaccine

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1 mandates. He voted in the election. He voted for  
2 legislatures that were in the position to engage in  
3 fundamental medical decision-making, and the Court in  
4 Boreali versus Axelrod specifically indicated in the  
5 smoking ban, that it's -- it's an excess of power to  
6 get involved with things involving fundamental medical  
7 decision-making.

8 I mean, what could be more fundamental than  
9 injecting someone with a substance they don't want  
10 which could potentially injure them if they already  
11 have natural immunity? You are absolutely correct, all  
12 of these police officers are being strong-armed. And  
13 the decision here is not about one police officer. If  
14 it's invalid to him, it's invalid to everybody. And I  
15 believe Garcia was a case also representative of others  
16 individually situated, and that holding in Garcia  
17 affected all children in numerous cases.

18 F.F. versus State of New York, the 2019  
19 Fourth Department case challenging the repeal of the  
20 religious exemption. That was a vaccine mandate case  
21 brought on behalf of all similarly situated. So if it  
22 violates Detective Marciano's rights, it violates  
23 everybody.

24 And I would like to address one thing about  
25 the temporary restraining order. I find it remarkable

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1       that the City actually claims that my client dragged  
2       his heels when they have had this vaccine available for  
3       over a year now. What is the hubbub? Another variant?  
4       Another omicron? These things are coming like  
5       watershed. You know what, the emergency is over. We  
6       have to learn to deal with it. And the law, as you  
7       absolutely pointed out, prohibits adult vaccine  
8       mandates. It's the City that dragged their heels here.  
9       It's the City that is manufacturing an emergency. If  
10      they were so concerned about police officers, fireman,  
11      sanitation workers, why didn't they do this last year?  
12      I think that is an important point.

13                 Further, Detective Marciano tried to obtain  
14      anonymity. I am not sure if you were aware of that.  
15      That was declined in the ex-parte division. And I  
16      would respectfully ask that you allow me to reargue  
17      that, because this case could end up to be another  
18      Jacobson. And my client is a modest man. He's a  
19      police detective. He takes his job and family life  
20      seriously. And he doesn't want to be the poster case  
21      for refusing vaccine mandates. But the fact is, he is  
22      not.

23                 With respect to the litany of cases raised by  
24      the City, I respectfully advise this Court that those  
25      cases involve religious freedom, religious

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1 accomodation, and whether or not this is a union  
2 contract. Our case is different. There is no other  
3 case out there. We have challenged this on preemption  
4 and separation of power and statutory construction.

5 And regarding DOH's authority, as again you  
6 aptly pointed out, it's gratuitous. Traditionally, the  
7 authority of the Department of Health has been to  
8 provide vaccine information. Free vaccines. Subway  
9 signs. There's never before been this type of mandate.  
10 I mean, all over the world people are looking at New  
11 York and wondering what is going on here. The City is  
12 crumbling under the weight of this. But the fact is,  
13 you could offer free vaccines, you could put a sign up  
14 in the subway but you can't hold somebody down and  
15 mandate them without legislative authority; and in the  
16 extreme, a Judicial Order of quarentine would be  
17 required under 2120.

18 My client has a Due Process right to the  
19 statutory protections of the State's law, which  
20 specifically limit adult vaccine mandates.

21 Thank you.

22 THE COURT: Do you wish to be heard further?

23 MS. FOWLKES: No, your Honor.

24 THE COURT: Or Mr. Mendez?

25 MR. MENDEZ: No, your Honor.

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1                   THE COURT: I will take a ten minute recess  
2                   and we will be back. I will review my notes here.

3                   (Recess taken.)

4                   COURT OFFICER: All rise.

5                   THE COURT: Thank you. Please be seated.

6                   All right. Thank you for your indulgence.

7                   After hearing the arguments of both counsel and reading  
8                   the documents that have been submitted with all  
9                   appropriate references and exhibits, while the Court is  
10                  not unmindful of the precedent with respect to  
11                  temporary restraining orders, this Court at this time  
12                  grants the temporary restraining order in the interests  
13                  of equity and this Court's overarching power to  
14                  exercise the Court's inherent interest of justice  
15                  jurisdiction. They attempted no prejudice asserted by  
16                  the municipal defendants that they will retain the  
17                  right to seek fiscal recovery in the event they  
18                  ultimately prevail.

19                  Conversely, requiring the individual  
20                  first-responders to bear the financial difficulties  
21                  during the pendency of these matters is not only an  
22                  unjust burden, but perhaps more concerning, provides  
23                  the defendants with the ability to exercise their  
24                  financially strong opposition to coerce the  
25                  first-responders to succumb to the demands of the

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1 Executive at the expense of losing their right to be  
2 heard on the merits.

3 While a number of other judicial opinions on  
4 the one hand recognize the sacrifices of our vaccinated  
5 and unvaccinated first-responders during these  
6 unprecedented times, such as the plaintiff in this  
7 case, and on the other hand deny them the benefits of  
8 their assured continued pay status while these matters  
9 proceed through the courts, this Court will not adhere  
10 to what this Court perceives as a most blatant  
11 injustice and hindrance to the plaintiff's right to be  
12 heard on the petition.

13 So, therefore, the temporary restraining  
14 order is issued pending the determination of this  
15 application. Thank you all very much.

16 MS. FINN: Thank you, Judge.

17 MR. MENDEZ: Your Honor, if I may?

18 THE COURT: How could I stop you?

19 MR. MENDEZ: I would just ask the Court to  
20 clarify as to whom the TRO is being issued, which  
21 employees? Are we talking all police officers?

22 THE COURT: I presume your argument is only  
23 Mr. Marciano; and the petitioner -- counsel on the  
24 behalf of petitioner is arguing all police officers.  
25 Court declines to clarify anything further.

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1 Thank you all very much.

2 \* \* \* \*

3 Certified to be a true and accurate  
4 transcript of the stenographic minutes taken within.

5 -----  
6 Tal R. Hahn,  
7 Senior Court Reporter  
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